

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Halina Pasko,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 21 L 654
Christina Martinez and August Schweppe,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

A motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) is to be granted if the plaintiff fails to demonstrate reasonable diligence in attempting service of process and fails to offer a satisfactory explanation for a delay in service. While the defendant has made a *prima facie* showing of a nine-month delay in effectuating service, the plaintiff has provided sufficient justifications to explain the delay. For these reasons, the defendant's motion to dismiss must be denied.

**Facts**

On February 3, 2019, August Schweppe's vehicle collided with another driven by Christina Martinez. Halina Pasko was a passenger in Schweppe's vehicle and sustained personal injuries. On January 20, 2021, Pasko filed her complaint against Schweppe and Martinez.

On or before February 3, 2021, Pasko issued a summons to the sheriff's office requesting service on the defendants. According to the sheriff's website, however, Martinez was not served and there was no request for service on Schweppe. Several months later, Pasko reviewed the case once the Cook County Case Search website was back online after being down for a period of time over the summer. Pasko realized that, contrary to the sheriff's website, the Cook County Case Search website did not have a status for Schweppe's service of summons. Pasko immediately instructed a private investigator, Jerry Wilson, to search for Schweppe's current location. Additionally, Pasko filed a motion for a special process server, which this court granted on September 9, 2021. After the original alias summons expired, Pasko filed a second alias summons. On November 2, 2021, Wilson effectuated service on Schweppe.

On November 24, 2021, Schweppe filed a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b). The parties fully briefed the motion. In her response, Pasko attached two payment confirmations reflecting her February 3, 2021 requests for service to the sheriff's website. Additionally, Pasko's lead counsel averred that in the spring of 2021, he contracted Covid-19 and was out of the office for more than three weeks. Wilson also averred that he attempted to serve Schweppe at least three times in September 2021. Wilson specifically averred that he spoke to Schweppe in early to middle September at the front desk of Schweppe's building complex, and Schweppe mentioned that he was out of state at the time. Schweppe also filed an affidavit stating that he never attempted to avoid being served in this case.

### Analysis

Illinois courts have likened a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) to a dismissal pursuant to Code of Civil Procedure section 2-619(a)(5), which authorizes a dismissal because the action was not commenced within the time limited by law. *See Smith v. Menold Constr., Inc.*, 348 Ill. App. 3d 1051, 1057 (4th Dist. 2004). Rule 103(b) specifically provides that:

[i]f the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant only and shall not bar any claim against any other party based on vicarious liability for that dismissed defendant's conduct. The dismissal may be made on the application of any party or on the court's own motion. In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances, including both lack of reasonable diligence in any previous case voluntarily dismissed or dismissed for want of prosecution, and the exercise of reasonable diligence in obtaining service in any case refiled under section 13-217 of the Code of Civil Procedure.

Ill. S. Ct. R. 103(b). "The purpose of Rule 103(b) is to protect defendants from unnecessary delay in the service of process on them and to prevent the circumvention of the statute of limitations." *Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990). At the same time, a Rule 103(b) dismissal is considered, "a harsh penalty which is justified when the delay in service of process is of a length which denies a defendant a 'fair opportunity to investigate the circumstances

upon which liability against [the defendant] is predicated while the facts are accessible.” *Id.* at 288 (quoting *Geneva Constr. Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 289-90 (1954)).

Courts are to employ a burden shifting mechanism to adjudicate a motion to dismiss under Rule 103(b). The defendant-movant is first required to make a *prima facie* showing that, after filing suit, the plaintiff failed to exercise reasonable diligence in serving the defendant. See *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949 (1st Dist. 2001) (citing *Martin v. Lozada*, 23 Ill. App. 3d 8, 11 (1st Dist. 1974); Robert A. Michael, Illinois Practice, Civil Procedure, § 8.7 at 93 (1989)). To judge what constitutes a *prima facie* case, a court is to consider the record to see if it reveals “unusual circumstances that would have prevented or otherwise hindered plaintiff’s ability to serve defendants . . . .” *Id.* Absent any unusual circumstances, the burden then shifts to the plaintiff “to demonstrate, with specificity and in conformity with the rules of evidence, that reasonable diligence was exercised and to offer an explanation to satisfactorily justify any delay in service.” *Id.* (citing *Segal*, 136 Ill. 2d at 286; *Kreykes Electric, Inc. v. Malk & Harris*, 297 Ill. App. 3d 936, 940 (1st Dist. 1998); *Tischer v. Jordan*, 269 Ill. App. 3d 301, 307 (1st Dist. 1995); Robert A. Michael, Illinois Practice, Civil Procedure, § 8.7 at 92, 95 (1989)).

There exists no absolute time frame that shifts the burden to the plaintiff; rather, the inquiry is made on a case-by-case basis. *Id.* (citing Robert A. Michael, Illinois Practice, Civil Procedure, § 8.7 at 33 (Supp. 2000)). As one court explained:

We have held that a time period of even five months between the filing of a complaint and subsequent service is sufficient to establish a *prima facie* showing of failure to diligently effect service. *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1045 (3d Dist. 2009); see also *Long v. Elborn*, 376 Ill. App. 3d 970, 980 (4th Dist. 2007) (seven months between filing and service supports a finding of lack of reasonable diligence). Therefore, we hold that regardless of whether 7 months or 13 months had elapsed before service occurred, the trial court did not abuse its discretion in finding that defendant successfully made a *prima facie* showing that plaintiff failed to timely execute service.

*Emrikson*, 2012 IL App (1st) 111687, ¶ 17.

Once it is the plaintiff’s burden, the standard employed is not based on the plaintiff’s subjective intent, but on an objective analysis of reasonable diligence in effectuating service. See *Kole*, 325 Ill. App. 3d at 950. There exists no exclusive list of factors to be considered, but the following have been

recognized as significant: (1) length of time to obtain service; (2) plaintiff's activities; (3) plaintiff's knowledge of the defendant's location; (4) ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of the pendency of the action as a result of ineffective service; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service. *See Segal*, 136 Ill. 2d at 287 (1990). These factors are to be considered in light of the purpose of Rule 103(b). *See id.*

Based on the record provided, Schweppe established a *prima facie* showing of Pasko's unreasonable lack of diligence. The record shows that it took ten months to serve Schweppe after the filing of the original complaint, nine months after the statute of limitations expired. Though the ten-month period of time, alone, suggests a lack of diligence, the burden shifts to Pasko to provide a satisfactory explanation for the delay in service. *See Emrikson*, 2012 IL App (1st) 111687, ¶ 17.

Although the length of time to obtain service was unreasonable, the record also points to various extenuating circumstances. First, it took ten months to obtain service on Schweppe. Second, Pasko's activities generally demonstrate that she attempted to effectuate service on Schweppe throughout that time. Third and fourth, it is unreasonable to suggest that Pasko knew of Schweppe's location. Though Wilson ultimately served Schweppe at his residence—the address appearing on the original summons—Wilson averred that he attempted to serve Schweppe three times in September 2021. Further, Wilson indicated that he spoke with Schweppe, who indicated that he was out of state. Fifth, Schweppe had actual knowledge of the claim in this matter because he had been named as a defendant in a case stemming from the same accident and spoke with Wilson about service on the claim. In contrast, Schweppe avers that he never attempted to avoid service of process. Such a difference in averments merely raises the question of Wilson and Schweppe's credibility. For the same reason, it does not appear that Schweppe's whereabouts were easily ascertainable.


Sixth, it is plain that Pasko's counsel encountered various technological and physical difficulties for which Pasko cannot be penalized. For example, Pasko's February 3, 2021, payment confirmations establish she timely issued the appropriate summons to the sheriff's office. On that date, Pasko issued two sets of summons to the sheriff's office for Martinez and Schweppe but received a notification that only Martinez had not been served. Also, that spring, Pasko's lead counsel contracted Covid-19 and was out of the office for more than three weeks.

Additionally, during the summer of 2021, the Cook County Case Search website was down for an extended period of time, interfering with Pasko's ability to check the status of the summons. As soon as Pasko became aware that the Cook County Case Search website did not have a status listed for Schweppe's service of summons, Pasko immediately instructed a private investigator to ascertain Schweppe's whereabouts. She then filed a motion for the appointment of a special process server. To that end, Wilson averred that he attempted service on Schweppe three times in September 2021 and actually spoke with Schweppe, who stated that he was out of state at the time. Seventh, after Pasko received a second alias summons, Schweppe was served on November 2, 2021. To that end, there is no evidence in the record that this matter has grown stale so as to prejudice either party.

Conclusion

For the reasons presented above, it is ordered that:

The defendant's motion to dismiss is denied.

  
John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 29 2022

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